

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**AUG 19 11 31 AM '93**

**MM Docket No. 93-232**

In the Matter of

Amendment of Section 76.51  
of the Commission's Rules  
to Include Concord,  
California, in the  
San Francisco-Oakland-San Jose,  
California, Television Market

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: August 11, 1993; Released: August 19, 1993**

**Comment Date: September 22, 1993**

**Reply Comment Date: October 7, 1993**

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed June 29, 1993, by First Century Broadcasting, Inc. ("First Century"), licensee of television station KFCB-TV, Channel 42 (Independent), Concord, California. First Century seeks to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the San Francisco-Oakland-San Jose, California, television market to include the community of Concord, California.<sup>1</sup>

**BACKGROUND**

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. See 47 CFR §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. See *CATV-Non Network Agreements*, 46 FCC 2d 892, 898

(1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. See *Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."<sup>2</sup>

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),<sup>3</sup> which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. See Section 614(f) of the Act.<sup>4</sup> The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

**THE PETITION**

5. In support of its proposal, First Century asserts that the current market designation does not reflect the competitive realities of the market. In this regard, it states that Concord is part of what is normally known as the Bay area, and is located 32 miles from San Francisco, 40 miles from San Jose, and 19 miles from Oakland. First Century further states that KFCB-TV, which began operating in 1985, places a Grade A signal over the three designated communities of the market, and that the Grade A signal contours of the stations licensed to San Francisco, Oakland and San Jose totally encompass Concord. First Century also notes that Arbitron includes KFCB-TV within the San Francisco-Oakland-San Jose Area of Dominant Influence (ADI). It states that KFCB-TV derives over 90 percent of its revenues from cities other than Concord within the mar-

<sup>1</sup> The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." See *Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

<sup>2</sup> See, e.g., *TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), citing *Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). See, also, *Press Broadcasting*

*Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

<sup>3</sup> Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>4</sup> In connection with the implementation of the broadcast signal carriage provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis. See *Report and Order* in MM Docket No. 92-259, *supra*.

ket. First Century thus asserts that these communities do, in fact, comprise a single television market for purposes of competition for audience and economic support.

6. First Century contends that amendment of Section 76.51 of the Rules to include the community of Concord is essential to equalize competition for cable carriage among all the local television stations in the area. Specifically, it maintains that although KFCB-TV competes directly with other stations licensed to San Francisco, San Jose and Oakland, because Concord is not a designated community in the subject Section 76.51 market listings, the station is not a "local signal" for purposes of copyright purposes throughout the market.<sup>5</sup> As a result, it states, although KFCB-TV is entitled to carriage on cable systems within the ADI under the Commission's must-carry rules,<sup>6</sup> the station would nevertheless be considered a "distant signal" for cable systems within the ADI, but beyond 35 miles of Concord, thus placing the station at a significant competitive disadvantage with respect to other area stations.<sup>7</sup> First Century states that this disparate treatment of KFCB-TV as against the other market stations threatens the viability of KFCB-TV. By the proposed amendment of Section 76.51, First Century maintains that KFCB-TV would be deemed a local signal within the ADI and would be able to compete for audience and revenues on an equal basis with other stations in the market. Moreover, First Century states that the severe economic and competitive disadvantage it would be forced to operate under demonstrates the particularized need for redesignation of the market as proposed, and maintains that the public will substantially benefit by assured access to KFCB-TV's programming. Therefore, it asserts that redesignation of the market as proposed will not only place KFCB-TV on a level playing field with its competitors, but will also comport with the goal of assuring that local stations have access to cable subscribers and that subscribers have access to all stations in a television market.

### DISCUSSION

7. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rulemaking process, including the comments of interested parties. It appears from the information before us that KFCB-TV and stations licensed to communities in the San Francisco-Oakland-San Jose television market do compete for audiences and advertisers throughout much of the proposed combined market area, and that evidence has been presented tending to demonstrate commonality between the

proposed community to be added to a market designation and the market as a whole. Moreover, First Century's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

### ADMINISTRATIVE MATTERS

#### Ex Parte Rules -- Non-Restricted Proceeding

8. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

#### Comment Information

9. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **September 22, 1993**, and reply comments on or before **October 7, 1993**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

#### Initial Regulatory Flexibility Analysis

10. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few television licensees and permittees will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

<sup>5</sup> Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Concord as a designated community in this market list results in KFCB-TV's classification as a "distant signal" for market-area cable systems more than 35 miles from Concord.

<sup>6</sup> See Section 76.56(b) of the Commission's Rules. First Century notes that KFCB-TV is entitled to carriage on cable systems within the San Francisco-Oakland-San Jose ADI regardless of whether the market is redesignated -- the issue presented here is the cost of such carriage. Nevertheless, First Century contends that redesignation of the market will entitle KFCB-TV to be carried on many more ADI-area cable systems without obligating it to indemnify many cable systems for the increased

copyright liability -- the asserted crux of its need for the requested action. Moreover, First Century states that amendment of Section 76.51 as proposed will neither result in cable carriage of KFCB-TV beyond the station's Grade B signal contour nor alter the number of cable systems on which KFCB-TV may be carried.

Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. See *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

**Additional Information**

11. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart  
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